



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HCC (OS) OF 21 OF 2016

H G W.....APPLICANT

VERSUS

R W GRESPONDENT

RULING

PRELIMINARY OBJECTION:

The Applicant filed under certificate of urgency under the Matrimonial Property Act 2013 and sought injunction to restrain the Respondent from selling, leasing, letting and charging, transferring or completing the conveyance in the outlined properties in the said application. On 20th June 2016, this Court granted temporary injunction restraining any sale transfer or disposal of the suit properties outlined in paragraph 8 of the applicant's supporting affidavit as they were in immediate imminent danger of disposal.

The Respondent filed Preliminary Objection on 17th August 2016 on the grounds that this court lacks jurisdiction to hear and determine the suit. The Applicant's application is bad in law and the same ought to be struck off. It is frivolous and vexatious and should be struck off with costs. The Applicant is guilty of non disclosure and the Court order of 20th June 2016 ought to be discharged.

On 13th October 2016, learned Counsel for the Respondent submitted that in reliance of Section 6(3) and 7 of the matrimonial Property Act, this Court lacked jurisdiction to hear the matter. The Originating Summons filed on 16th June 2016 is premature as the Applicant and Respondent are not divorced and their marriage is not dissolved.

Secondly, Respondent contests the properties listed as comprising of matrimonial property and states that the Respondent did not contribute to the acquisition and development of these properties.

Learned Counsel for the applicant objected to the Preliminary Objection and relied on Section 17 of Matrimonial Property Act where the Court may declare rights of each party to the specific property pending division of matrimonial property.

Counsel further relied on Article 45 (3) of COK 2010 that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. Therefore the Preliminary Objection should not be upheld.

DETERMINATION

A preliminary objection is defined as follows;

MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A. 696.

“... is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

In the instant case it is the law that division of matrimonial property commences upon the dissolution of the marriage or divorce.

See **ESTHER WANJIKU MWANGI versus JOHN MUNENE KANYI & MARGARET WANGUI NGANGA ELC 166 OF 2013(MALINDI HCT)**

P.W.M versus E.M CIVIL SUIT 1 OF 2013 (MURANGA HCT) However, the instant Originating Summons filed by the Applicant is based on various other prayers apart from singly division of matrimonial property. Therefore unless and until the matter is set down for hearing and before this hearing the issue of whether the marriage is dissolved or not is canvassed; this Court will not strike off the application.

The issue raised though valid, is one of the pertinent condition precedent to the division of matrimonial property.

Secondly, the Originating Summons contains various prayers; injunction, alimony, involvement in management of the matrimonial property, failure to account the sold properties etc. Therefore until the same is heard; one cannot tell in advance what the Applicant through Counsel shall pursue. All matters raised in the Preliminary Objection are the subject of hearing and determination of the Originating Summons. These issues are subject to adducing evidence to prove one's claim. The issues are facts to be proved and not a pure point of law.

The preliminary Objection is dismissed with costs.

The Court orders issued on 20th June 2016 remain in force

The parties to obtain a hearing date from the Registry.

DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 28TH SEPTEMBER, 2017.

M. W. MUIGAI

JUDGE